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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

YOUNG & RUBICAM, INC.,
Petitioner/Cross-Respondent,

vs.

BETTE MIDLER,
Respondent/Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err in affirming the District Court's Order of partial summary judgment precluding Bette Midler from seeking punitive damages at the trial in this case?

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OPINIONS BELOW

There have been five opinions below in this matter:

1. Bette Midler v. Young & Rubicam, Inc. (9th Cir. 1991) (September 20, 1991) (Hug J., Tang J., Noonan J.) (Memorandum and Order) (Affirming the grant of partial summary judgment to Young & Rubicam, Inc. on the issue of punitive damages and judgment at trial which had been the subject of a cross-appeal.

2. Bette Midler v. Young & Rubicam, Inc. (February 8, 1989) (Fernandez, J.) (Granting plaintiff's motion for partial summary judgment and granting Defendants' motion for partial summary judgment on the issue of punitive damages.)

3. Bette Midler v. Ford Motor Company and Young & Rubicam, 849 F.2d 460 (9th Cir. 1988) (June 22, 1988) (Hug. J., Tang, J. and Noonan, J., opinion by Noonan, J.) (Reversing District Court's order in part which granted summary judgment for Defendants.)

4. Bette Midler v. Ford Motor Company and Young & Rubicam, CV 86-2683 (C.D. Cal. 1987) (August 12, 1987) (Fernandez, J.) (Statement of Uncontroverted Facts and Conclusions of Law) (Granting summary judgment for Defendant on all claims, denying Plaintiff's motion for summary judgment.)

5. Bette Midler v. Ford Mctor Company and Young & Rubicam, (Hug J., Tang J., Noonan J.) (August 26, 1988) (Denying Defendants' request for rehearing en banc.)

The opinions have been reproduced in the Appendix to Young & Rubicam, Inc,'s petition for writ of certiorari Docket No. 91-1002.

STATEMENT OF JURISDICTION

This is an action for violation of rights under California law. The District Court had jurisdiction pursuant to 28 U.S.C. §1332, based on diversity of citizenship and claims exceeding $10,000 exclusive of interest and costs. Following the entry of final judgment by the District Court on October 30, 1989, an appeal was filed by cross-petitioner Bette Midler on November 29, 1989, pursuant to Federal Rule of Appellate Procedure 4(a)(2) and a cross-appeal was filed by cross-respondent Young & Rubicam, Inc. on December 13, 1989. The Court of

Appeals issued its order affirming the order appealed on September 20, 1991.

Young & Rubicam, Inc. filed a petition for writ of certiorari from the Court of Appeals September 20, 1991 order on December 19, 1991. Bette Midler received a copy of Young & Rubicam, Inc.'s petition for writ of certiorari on December 23, 1991. Bette Midler submits this cross-petition for writ of certiorari pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3294(a) of the California Civil Code provides that:

> In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that

> the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Section 3294(c) of the California Civil Code provides that:

> As used in this section, the following definitions shall apply:
>
> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
>
> (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust harship in conscious disregard of that person's rights.
>
> (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

STATEMENT OF THE CASE

This action arose out of the television broadcast of commercial adver-

tisements for Lincoln-Mercury automobiles in 1986. Young & Rubicam, Inc. designed the advertisements to convey the impression that Bette Midler was singing for their commercial. (App. A11). Young & Rubicam, Inc. accomplished this deception by utilizing Ula Hedwig, a former background singer for Bette Midler to sound as much like Bette Midler as possible while she was making the recording which was used for the television advertisement. (App. A10.)

Midler commenced this action by filing a complaint on April 29, 1986. (App. A56.) A first amended complaint was filed on May 27, 1986. Midler's first amended complaint alleged the following four substantive causes of action: (1) unfair competition, (2) violation of Midler's right of privacy,

(3) violation of Midler's right of publicity and (4) violation of California Civil Code §3344. (App. A56.) Midler sought compensatory damages, punitive damages, injunctive relief and an accounting of profits.

A cross-motion for summary judgment brought by Young & Rubicam, Inc. on Midler's first amended complaint was granted by the District Court on July 13, 1987 on the grounds "that Plaintiff has no protectable rights under the laws of California." (App. A60.)

On June 22, 1988, the Ninth Circuit reversed the District Court order granting Young & Rubicam, Inc.'s motion for summary judgment. Midler v. Ford Motor Co., 849 F.2d 460, (9th Cir. 1988) (App. A41.) ("Midler I"). The Midler I court held:

> We hold that when a distinctive voice of a professional singer is

> widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California. (App. A48).

Subsequent to the Midler I decision Young & Rubicam, Inc.'s brought a motion for partial summary judgment with respect to Bette Midler's claim for punitive damages. Bette Midler opposed Young & Rubicam, Ic.'s motion for partial summary judgment by submitting evidence that Young & Rubicam, Inc. had engaged in fraudulent conduct entitling Bette Midler to an award of punitive damages under California Civil Code §3294. In an order dated February 8, 1989 the District Court granted Young & Rubicam, Inc.'s motion for partial summary judgment without any discussion of the evidence of Young & Rubicam, Inc.'s fraudulent conduct. (App. A34-37.)

Bette Midler's motion for reconsideration was denied on September 25, 1989. (CA. App. ER at 229.)

The jury trial in this action commenced on October 24, 1989. The District Court charged the jury with determining the following facts only:

> (1) Whether Young & Rubicam, Inc. deliberately imitated Bette Midler's voice in producing Ford Motor Company's Sable automobile television commercial, and, if the answer to the first question is "Yes", then,
>
> (2) The fair market value of Bette Midler's voice. (C.A. App. SER at 118.)

The jury found that Young & Rubicam, Inc. had deliberately imitated Bette Midler's voice in its television commercial and returned a verdict in Bette Midler's favor in the amount of $400,000.

On November 29, 1989 Midler filed a notice of appeal with respect to the

trial court's order granting Defedants' summary adjudication on the punitive damages issue. Defendant Young & Rubicam, Inc. filed a cross-appeal on December 13, 1989. In a September 20, 1991 opinion the Ninth Circuit Court of Appeals affirmed the District Court's order precluding Plaintiff from seeking punitive damages at trial ("Midler II").

REASONS FOR GRANTING CROSS-PETITION FOR WRIT OF CERTIORARI

The Ninth Ciruit's decision in Midler II upholding the District Court's order of partial summary judgment as to Bette Midler's claims for punitive damages is in conflict with the opinion in National Bank of Commerce v. Shaklee Corporation, 503 F.Supp. 533 (W.D. Texas 1980) and the

Ninth Circuits own decisions. Furthermore, Midler II tends to erode Plaintiff's statutory rights under California Civil Code §3294 by taking away fraud as a basis for recovery of punitive damages. Finally, the Midler II decision does not adhere to the rules concerning burdens of proof on motions for summary judgment set forth by the court in Celotex v. Catrett, 477 U.S. 317 (1986).

POINT I

THE MIDLER I DECISION ERODES PLAINTIFFS' RIGHTS TO RECOVER PUNITIVE DAMAGE UNDER CALIFORNIA LAW

Supreme Court review is warranted to prevent the erosion of a statutory or legal principle. Wilkerson v. McCarthy 336 U.S. 53, 55 (1949). Supreme Court review is also warranted if an error by a lower court has entailed a harsh result. Montana v. Kennedy, 336 U.S. 308, 309 (1961). Here, the Ninth Circuit decision in Midler II erodes plaintiffs' rights to seek punitive damages under California Civil Code Section 3294.

California Civil Code Section 3294 provides that a plaintiff may recover punitive damages in any tort action on the following basis:

> In an action for the breach of an obligation not arising from con-

> tract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. California Civil Code Section 3294(a) (emphasis added)

For the purposes of recovering punitive damages under California Civil Code Section 3294 fraud is defined as follows:

> "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. California Civil Code Section 3294(c)(3).

The court in Walker v. Signal Cos., Inc., 84 Cal.App.3d 982, 149 Cal.Rptr. 119 (1958), interpreting California Civil Code Section 3294, held that since the words "oppression,

fraud or malice" were written in the disjunctive, "fraud" alone forms an adequate basis for the award of punitive damages. Indeed, the Ninth Circuit in Glovatorium, Inc. v. NCR Corporation, 684 F.2d 658 (9th 1982).

> There is no requirement under Cal.Civil Code §3294 that malice, reprehensible or outrageous conduct or wilful disregard be shown in addition to the fraud. Id. at 663.

Despite the holding in Glovatorium, the the Court of Appeals in Midler II and the District Court in its February 8, 1989 order granting Young & Rubuicam, Inc.'s motion for partial summary judgment held that Bette Midler was required to provide evidence of "malice" as defined by California Civil §3294. (App. A6-7, A30.) Thus, the lower court decisions in this case have had the harsh result of taking away fraud as a ground for recovering

punitive damages under California Civil Code §3294 away from Bette Midler even though both the statute itself and applicable case law indicate that fraud alone is a sufficient basis for an award of punitive damages.

POINT II

THE NINTH CIRCUIT'S OPINION IN MIDLER II IS IN CONFLICT WITH OPINIONS OF COURTS IN OTHER CIRCUITS AS WELL AS ITS OWN OPINIONS ON PUNITIVE DAMAGES

The Midler II holding that fraud alone can not serve as a basis for recovery of punitive damages is in direct conflict with the decision in National Bank of Commerce v. Shaklee Corporation, 503 F.Supp. 533 (W.D. Texas 1980) and the Ninth Circuit's own decisions in Cher v. Forum Inter-

national, Ltd., 692 F.2d 634 (9th Cir. 1982) and Glovatorium, Inc. v. NCR Corp., 684 F.2d 658 (9th Cir. 1982).

In contrast to the instant case, Cher v. Forum International, Ltd., 692 F.2d 634 (9th Cir. 1982) and National Bank of Commerce v. Shaklee Corporation, 503 F.Supp. 533 (W.D. Texas 1980) are two right of privacy/publicity cases in which punitive damages were awarded because the defendants had committed a fraud on the public by deceiving the public into believing that a celebrity had endorsed or been associated with their products.

In Shaklee, punitive damages were awarded because the defendants had deceived the public about the association between their product and the plaintiff. The plaintiff in Shaklee was the Estate of Heloise Bowles, the

late author of the newspaper column entitled "Hints from Heloise," which had appeared daily in almost six hundred newspapers in the United States and abroad. Id. at 536. The defendants, Shaklee Corporation, a direct sales organization which manufactures and sells household cleaners, food supplements and cosmetics published a promotional addition of Heloise's book entitled "All Around the House" featuring Shaklee advertisements scattered throughout the book. Id. at 538. The court, applying California law, found that Shaklee's distribution of the book violated Heloise's right of privacy and awarded Heloise's estate punitive damages on the following basis:

> The court is of the opinion and finds that Shaklee's conduct in using Heloise's name was intentionally and cleverly calculated to

> produce the inference that Heloise was associated with, approved and endorsed Shaklee and Shaklee products. This intention is easily discerned from reading the offending materials authored by Shaklee. Id. at 548.

In Cher the defendant, Forum International, Ltd., had violated Cher's right of publicity, by among other things, falsely implying that Cher had endorsed Forum Magazine Id. at 639. The court held that:

> Some exemplary damages can be supported as punishment for the false advertising and promotional misrepresentations of those defendants. Id. at 640.

The Midler II court's decision to preclude Bette Midler from submitting evidence of Young & Rubicam, Inc.'s fraudulent scheme to associate her with their product at trial is inconsistent with the factually similar Shaklee and Cher cases and should be reversed.

POINT III

MIDLER II IS INCONSISTENT WITH THIS COURT'S DECISION IN CELOTEX

In Celotex Corp. v. Catrett, 477 U.S. 317 (1986) this court explained the standard to be applied to determine whether the movant has met its summary judgment burden. In a 5-to-4 decision, the majority and the dissent both were in agreement as to how the summary judgment burden of proof operates. 10A C. Wright, A. Miller and Kane, Federal Practice and Procedure (2d ed. Supp. 1983) Section 2727 at 21. Justice Rehnquist, writing for the majority described the movant's initial summary judgment burden as follows:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, deposi-

> tions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. Id. at 274.

Here Midler's claim for punitive damages relied in part on the allegations concerning Defendants' fraudulent conduct, a recognized basis for recovery of punitive damages under California Civil Code Section 3294. (See Paragraphs 25 and 33 of the First Amended Complaint, E.R. 1) Although Defendants' motion for partial summary judgment was solely directed to Midler's claim for punitive damages, Defendants neither informed the court that they were attacking the fraud allegations supporting Midler's claims for punitive damages in their moving papers nor did they submit any evidence whatsoever to negate Midler's allega-

tions of fraudulent conduct. (E.R. 15-41, 163-187)

In fact, as set forth elsewhere in brief, Midler had submitted uncontroverted evidence of Defendants' fraudulent conduct thereby supporting her claim for punitive damages. However, under Celotex, Defendants' failure to address a material portion of Midler's punitive damage claims in their motion for partial summary judgment, in itself, constituted grounds for denying the motion as to the fraud allegations supporting the punitive damage claim. At most, the trial court should have granted the motion for partial summary judgment as to the "malice" and "oppression" allegations supporting the punitive damage claims.

CONCLUSION

For the foregoing reasons, Respondent Bette Midler respectfully requests that her Cross-Petition For Writ of Certiorari be granted

Dated: Los Angeles, California

January 20, 1992

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